The Role of Concordats in the New Governance of Britain

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The Role of Concordats in the New Governance of Britain: Taking Subsidiarity Seriously?[1]

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Devolution has changed fundamentally the system of governance within the UK. The devolution of legislative and administrative competencies over a wide range of policies to Scotland and Wales necessitated the introduction of arrangements for policy co-operation and co-ordination involving UK Government and the devolved administrations. These arrangements are set out in concordats. This article considers why the concordats were necessary, and analyses their role as devices for maintaining coherence in, and legitimacy of, UK governance in the face of the challenges raised by devolution. It then extends the analysis of concordats to an examination of the role that sub-national authorities generally might play in multi-level governance systems. It does so by concentrating on the subsidiarity debate in EU governance, and considers whether this concept can be applied to inform the structure of policy assignment in that multi-level governance system. The lessons gleaned from a study of UK devolution suggest that subsidiarity, while a potentially useful framework for assigning powers between national and supranational levels within a trans-national governance system, has little relevance when applied to the role of sub-national governance in trans-national systems.

A. INTRODUCTION

Concordats have emerged as a device for co-ordinating UK governance in the wake of devolution to Scotland, Wales and Northern Ireland. They are agreements between UK Government and the devolved administrations which are intended to ensure the coherent governance of the UK notwithstanding the devolution of

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legislative powers to the Scottish Parliament and administrative autonomy to the National Assembly for Wales. Concordats stipulate the procedures and rules to be followed by the UK Government and devolved administrations for effecting co-operation and co-ordination in policy processes characterised by shared competence (i.e. concurrent powers), or with respect to policies where the actions of one administration will impact on the policy environment of the other administration. Why concordats are necessary is implicit in a comment made by Vernon Bogdanor:

> Devolution is the most radical constitutional reform this country has seen since the Great Reform Act of 1832. This is because it seeks to reconcile two seemingly conflicting principles, the sovereignty or supremacy of Parliament and the grant of self government in domestic affairs to Scotland and Wales.[2]

The role of concordats is to achieve precisely the reconciliation that Bogdanor identifies. It is in this context that we must appraise concordats, a context in which the political—and by implication the constitutional—significance of concordats is starkly revealed. Against this background, it is therefore unsurprising that the publication of concordats itself became a political event. That the concordats were presented as an already agreed series of documents was greeted with substantial protest from the nationalist lobby within the Scottish Parliament and, to a lesser extent, the Welsh Assembly.[3] Leaving to one side for the moment the validity of the criticisms levelled against concordats, the debate itself was constitutive in defining the central political and constitutional significance that the concordats would have in the future governance of the UK.

In this article we review the concordats both from a procedural and an analytical perspective—what role they are intended to play, and how we might appraise the concordats in that context. We offer two perspectives on this question. First, we critique the concordats on the terms on which they are presented—namely, as instruments of "good governance" necessitated by the particularities of the devolution settlement. We find there is much persuasiveness in that argument although, as we demonstrate, establishing the administrative need for concordats cannot in itself validate or refute the criticisms that have been made against them. In the main, the focus of this paper is devolution under the Scottish model. Unlike the situation under the Government of Wales Act, devolution to Scotland transferred legislative authority to the Scottish Parliament with the result that the fault lines in the resultant UK governance system became very clear. As the role of the concordats is to stabilise these fault lines, it is in the Scottish model of devolution that a critique of concordats

2 V Bogdanor, "Constitutional Reform in the UK". Paper presented at the Centre for Public Law, University of Cambridge, January 1998.

3 For example, the Liberal Democrat leader in the Welsh Assembly observed that: "the tone of the document [concordat] could sometimes be seen as treating us as country cousins". Cited in J Osmond, *Devolution: "A Dynamic, Settled Process"* (1999) at 30.

reveals the full extent of the underlying issues. Second, we consider the concordats as instruments of multi-level governance within the context of the EU. To what extent is devolution within the UK consonant with the trend towards enhanced intra-EU "regionalism", and does the analysis of concordats cast any light on how the EU governance system might be arranged to deal with an essentially similar set of problems—that is, the reconciliation between administrative efficiency on the one hand and political or constitutional legitimacy on the other? As we discuss, the debate within the UK with respect to the domestic policy content and context of EU policies is one that is mirrored elsewhere in the EU. Moreover, it is a debate that is likely to become more intense as global "management" of hitherto national (and sub-national) economic and social policies becomes more formalised and, as a result, more invasive.

The remainder of the article is arranged as follows. In section B we present a narrative which documents the history and the content of the concordats, and describes the function they perform in the organisation of UK governance in the aftermath of devolution to Scotland and Wales. In section C we offer a critique of the concordats as instruments of governance. We apply two criteria in this critique—legitimacy and accountability. In section D we extend our analysis of UK devolution to the EU arena and review the lessons that devolution has for the evolution of intra-EU regionalism, or multi-level governance. We offer our conclusions in section E.

B. THE CONCORDATS

(1) The need for concordats

Devolution formed the centrepiece of the 1997 Labour Government's package of measures aimed at modernising the British constitution.[4] Following the territorial elections held in May 1999, the newly created Scottish Parliament and Welsh Assembly convened in July, and by so doing changed fundamentally the governance system of the UK. Devolution served to shift the locus of British political and administrative power away from the Westminster–Whitehall nexus. Henceforth, the territorial capitals in Scotland and Wales would command considerable direct and indirect influence over the devolved economic and social policies and, albeit to a lesser degree, the policies for which competence is reserved to the UK Government. A distinctive feature of the devolution settlement is its asymmetric nature with respect to the powers granted to the administrations in Scotland and Wales. The Scotland Act 1998 provided for the establishment of the Scottish Executive and a

4 Other elements were freedom of information legislation, reform of the House of Lords, electoral reform, and initiatives designed to modernise Government and Parliament.

directly elected legislature—the Scottish Parliament—with competence to pass primary legislation over all devolved policies. In contrast, the Wales Act did not provide for a separate Welsh legislature. Instead, the directly elected Welsh Assembly would have the power to implement and administer those aspects of UK Government legislation devolved to it under the transfer of functions order—essentially the same set of policies as those over which the Scottish Parliament has legislative competence. The executive powers of the Assembly are delegated to the First Minister who is elected by the whole Assembly. He in turn delegates administrative responsibility to a number of Assembly Secretaries who collectively form the Assembly Cabinet.[5] Unlike the approach taken to devolution in the 1970s, the current variant identified policies that will remain the prerogative of UK Government (reserved matters),[6] with all policies not so designated being devolved. Notwithstanding this formal assignment, it was recognised from the outset that the interaction between devolved and reserved policies would necessitate close co-operation and co-ordination between UK Government and the devolved administrations on virtually all matters. For instance, both devolution White Papers noted that the devolved administrations would be closely involved in the UK Government policy process with respect to EU issues—an example of a reserved matter which impacts significantly on devolved competencies.[7] Two avenues of territorial involvement in reserved matters were identified—through the offices of the territorial Secretaries of State, who retain their membership of the Cabinet (and, crucially, Cabinet Committees), and via inter-administration and inter-governmental arrangements to be agreed and codified in the form of concordats.[8] Once devolution had taken effect, the concordats would play a pivotal role in the new arrangements.

The centrality of the concordats to the new governance system of the UK can readily be demonstrated by considering the devolution legislation itself. Neither the Scotland Act nor the Wales Act provided for an institution or a procedure to facilitate either co-operation or dispute settlement between UK Government and the devolved administrations, or between the devolved administrations themselves, with respect to policies of joint interest—be these reserved or devolved. The only arbitration provision mentioned in the legislation referred to inter-administration disputes over *vires* and these would be settled by the Privy Council. Instead, it was left to putative concordats to prescribe the procedures and arrangements—including

5 The Assembly is a corporate body.

6 Reserved matters are: constitution of the UK; foreign policy (including relations with the EU); defence and national security; border controls; fiscal and monetary policies (excepting the tax varying power under the Scotland Act and local taxation); common market for UK goods and services; employment regulation; social security; regulation of certain professions; transport safety and regulation; and certain other matters such as Ordnance Survey, broadcasting, etc.

7 See White Papers; *Scotland's Parliament* (Cm 3658), ch 5 and *A Voice for Wales* (Cm 3718), ch 3.

8 Concordats are referred to in both White Papers.

inter-administration dispute settlement—for mediating the relevant policy processes once devolution took effect.[9] Clearly, the concordats would assume considerable administrative importance. Beyond this, however, they also would play a crucial political role under the UK devolution model. Under ss 35 and 58 of the Scotland Act, the Secretary of State is granted a general "power to intervene" to prevent Acts of the Scottish Parliament entering into force where these may be incompatible with UK international obligations or legislation on reserved matters. The Lord Chancellor, Lord Irvine, neatly summarised the resulting constitutional position when he noted: "Although the Westminster Parliament *ultimately retains sovereignty*, the Scottish Parliament and Scottish Executive enjoy a very high level of autonomy."[10] Of course, should the Secretary of State exercise this power to intervene then almost certainly this would precipitate a political crisis. Consequently, it would fall to the procedures and arrangements set out in concordats to prevent such a situation from arising. Therefore, although the concordats are not, by definition, constitutional documents, it is indisputable that they occupy a pivotal position within the devolution settlement.

As instruments of governance, concordats are designed to tackle two types of policy externality that arise in many multi-level systems of governance—policy overlap and policy contagion.[11] Policy overlap occurs when two tiers within a unitary governance system each have competence over a particular policy—this is commonly described as the problem of concurrent powers. Devolution has triggered two situations of potential policy overlap; first, when legislative proposals being considered by the devolved administration conflict with UK legislation, or legislative proposals, with respect to reserved matters; second, when legislative proposals being considered by UK Government conflict with the devolved administration's legislation, or legislative proposals, with respect to devolved matters. Policy overlap is unavoidable in the UK devolution model, and represents a potential source of dispute between UK Government and the devolved administration. The problem is readily demonstrated with respect to policy on EU matters. Although UK European Union policy is a reserved matter, devolution transferred legislative competence to the Scottish Parliament (and the administrative authority to the Welsh Assembly) for a range of issues that have a significant EU dimension—e.g. agriculture, fisheries, the

9 On 27 July 1998 Baroness Ramsay made a statement in the House of Lords announcing that a dispute resolution process would be established under the aegis of the Joint Ministerial Committee. See HL Debs 27 July 1998, col 1488.

10 Speech delivered by the Lord Chancellor, Lord Irvine of Lairg, entitled "Britain's programme of constitutional change", University of Leiden, The Netherlands, 22 October 1999 (text available at *http://www.open.gov.uk/lcd/speeches/1999/1999fr.htm*) (emphasis added).

11 Typically, policy externalities within multi-level governance (pluralist) systems are resolved according to clear constitutional rules mediated through transparent political procedures—that is, through properly constituted federal institutions and processes. Clearly, this does not apply to the reformed UK governance system.

environment, transport and regional policies. Policy overlap becomes problematic if the position adopted by the UK Government with respect to an EU legislative proposal on a devolved matter diverges from the devolved administration's position on that issue. For this reason, the devolution White Papers included a commitment by the UK Government to work with the devolved administrations at each of the four stages of the UK's European policy process—policy formulation, negotiation, implementation and enforcement.[12] Policy overlap can be managed by two mechanisms: (a) by restricting the legislative autonomy of the devolved administrations with respect to devolved competencies; (b) by imposing on UK Government an obligation to consult with the devolved administrations over policy developments in reserved matters. The concordats represent just such mechanisms, and stipulate arrangements for co-operation and co-ordination between the UK Government and the devolved administrations in cases of overlapping competencies. Further, the concordats specify the procedures that will be triggered if the administrations fail to agree a consensus position.

The concordats were also intended to resolve the problem of policy contagion. Policy contagion occurs when the policy adopted (or proposed) by a devolved administration impacts upon—or threatens to impact upon—the policy choices confronting another devolved administration, or the national administration. It is a standard problem of policy assignment in federal-type structures. The asymmetric nature of the devolution settlement suggests that policy contagion is most likely to arise between the Scottish and UK administrations. In the devolution debate policy contagion was first anticipated in the context of territorial competition in the financial incentives offered to attract inward investment. Both White Papers stated that such incentives would be subject to ". . . common UK guidelines and consultation arrangements to be set out in a published concordat".[13] In the event, similar concerns about contagion are evident in a number of the concordats. The concordat between the Scottish Executive and UK Government on Health and Social Care is a good example. It states that:

> The creation of the . . . [devolved administrations] . . . allows greater divergence in policy making to address local needs and priorities. Without close co-operation between all four UK administrations there is the risk that developments in one administration *may inadvertently constrain or put pressure on policy or finances of the other administrations.*[14]

12 See *Scotland's Parliament*, ch 5. The Welsh White Paper included a similar commitment that UK European policy would incorporate Welsh considerations.

13 See *A Voice for Wales*, para 2.24 and *Scotland's Parliament*, para 2.4. The intention was to avoid competition between administrations for footloose investment from arising. However, some MPs felt that this provision undermined the Scottish Executive's autonomy over industrial policy—a devolved competence—and would result in a reduction in the volume of inward investment to Scotland.

14 Concordat on Health and Social Care, para 1 (emphasis added).

The apparent contradiction between advocating the devolution of competencies and simultaneously restricting the degree to which this can be exercised autonomously is explained insofar as policy differences between discrete legislative or administrative jurisdictions become a factor determining economic or social decision-making (i.e. resource allocation and/or movements of factors of produc-tion).[15] An added source of concern to the UK Government was the possibility that policy contagion would acquire an explicitly political aspect—for example, should a Scottish administration utilise its policy competencies with the express intention of undermining UK Government's policy decisions.[16]

In the light of our discussion thus far, the presentation of concordats as constitutionally neutral devices—necessitated by policy externalities arising from devolution and essential if a unitary UK governance system was to be maintained—is persuasive.[17] Yet, a different interpretation of concordats has been offered by their critics.[18] When viewed against a backdrop of asymmetric devolution, the pervasive problem of concurrent powers, and the perceived costs of policy contagion, concordats have been attacked as arrangements designed to stifle devolution and instead to buttress the dominance of central government in the context of an apparent shift to a pluralist (or multi-level) governance system. Before examining this critique, we devote the remainder of this section to setting out the structure and scope of the concordats as "administrative" instruments.

(2) The structure of the concordats

Implementing devolution in a policy-efficient manner necessitated that new arrangements were devised to facilitate co-operative and co-ordinated policy-making between the UK Government and the devolved administrations—i.e. to manage policy externalities. Prior to devolution, of course, these were managed internally. The territorial contribution to the UK policy-process was the responsibility of the Scottish and the Welsh Offices, and their respective Secretaries of State. Officials from the territorial offices participated in all the relevant official policy-networks within UK Government, including the all-important Cabinet Committee network responsible for brokering a consensus policy position where inter-departmental disputes had arisen. With devolution and the creation of a new governing tier outside

15 In public finance terms it is a standard argument that where the effects of a policy introduced in one jurisdiction spill over to another jurisdiction there is a case for central intervention to promote that activity if it is beneficial, or restrict it if it is harmful.

16 This would be more likely if the political complexion of the devolved administrations differed from the UK Government.

17 The concordats may be described as procedures for handling the additional policy transaction costs that arise with devolution.

18 See the comments by John Swinney, MSP, and Alex Neil, MSP, in the course of the debate over concordats held in the Scottish Parliament on 7 October 1999.

of UK Government, the devolved administrations no longer had access to these official networks and new agreements had to be established to facilitate co-operation and co-ordinated policy-making between the now separate administrations. As was noted in the devolution White Paper, *Scotland's Parliament*:

> The Scottish Executive will need to keep in close touch with departments of the UK Government. Good communication systems will be vital. Departments in both administrations will develop mutual understandings covering the appropriate exchange of information, advance notification and joint working. The principles will be as follows:
>
> - the vast majority of matters should be capable of being handled routinely among officials of the departments in question
> - if further discussion is needed on any issue, the Cabinet Office and its Scottish Executive counterpart will mediate, again at official level
> - on some issues there will need to be discussions between the Scottish Executive and Ministers in the UK Government.[19]

The concordats elaborated the principles of inter-administration co-operation, and defined the framework within which co-ordinated policy-making would evolve. It was implicit from the outset, and stressed on many occasions subsequently, that concordats would *not* create legal obligations or restrictions on any signatory.[20] They would be voluntary codes of conduct to guide the day-to-day work of officials in the respective administrations, and could be re-negotiated in the light of experience.[21] Concordats were (to be regarded as) neutral political and constitutional documents, whose purpose was to effect a seamless transition of the UK policy process from a system involving one administrative entity to a multi-player system involving a number of participants. The concordats were based on four guidelines: (a) full communication and consultation between the administrations on matters of joint interest, with each administration giving due consideration to the views of the other; (b) co-operation between administrations in all stages of the development of policies for which each had competence; (c) a full exchange of information between the administrations on all relevant policy-related matters—the principle of "no surprises"; and (d) each administration would respect the confidentiality of information passed to it by the other, subject to safeguards where necessary.

As befitted their functional nature, the preparation of concordats was left in the hands of officials during the run-up to devolution and normally would be signed by senior officials in Whitehall and their counterparts in the territorial administrations. Ministers would become involved only where the subject-matter was (deemed to

19 *Scotland's Parliament*, ch 4.13.

20 Were they so to do, they would be elevated to a constitutional status and may be a subject of legal debate.

21 This was very much in keeping with the UK/Whitehall approach to governance, which prefers codes and procedures rather than the juridification associated with many forms of constitutionalism.

be) politically sensitive, or where officials were unable to agree the precise terms of a particular concordat. The intention was that the concordats would be published once ready, and the expectation was that this would be prior to the inaugural elections to the devolved assemblies scheduled for May 1999. In the event, the first concordats were not published until late in 1999. A number of reasons were given for the delay, the most convincing of which was simply that the concordats were not ready on time. However, the implication was that the relevant time frame incorporated a political window which closed ahead of the election date to avoid the concordats becoming an election issue.[22]

The officials charged with drafting the terms of the concordats have acknowledged that, in large measure, they were "making it up as they went along". There was no master plan; no pre-existing model; no apparent political agenda. Instead, the only rule—if it can be called such—was that, wherever possible, prevailing inter-departmental good practice would be codified in the concordat, thereby becoming (post-devolution) recommended inter-administration good practice. Continuity rather than change was sought wherever possible. Therefore, where an administration was considering policy developments which would impact on the other (i.e. where a policy externality arose), co-operation and co-ordination would be managed principally on an inter-departmental basis much as before—that is, between the relevant department in Whitehall and its counterpart in the devolved administrations.[23] New arrangements and procedures would be proposed only where required in the light of the changed constitutional situation. This tended to be the case where the policy issue did not have an obvious departmental home—for instance where the matter was relevant to a number of departments within the devolved administration and cross-departmental co-ordination was required. In such cases, responsibility tended to fall to the relevant central agency within the administrations.[24] The most difficult challenge was to devise arrangements capable of mediating disputes between the territorial administration(s) and UK Government in those instances where the inter-departmental procedures (including the good offices of the territorial Secretary of State) had failed to broker a consensus. This raised complex questions of procedure and constitutionality. While it was self-evident that these arrangements could not compromise the ultimate sovereignty of

22 The fact that, in the event, the concordats were not published until late in 1999 does suggest that they simply were not ready sooner rather than their being caught up in a pre-election purdah. An added complication during this period was the lack of progress being made with the devolution settlement in Northern Ireland, which may have contributed to this delay.

23 The pervasive incidence of policy externalities under the UK devolution model always implied that a large number of concordats would be required.

24 The Cabinet Office fulfilled this role in Whitehall, and the newly established Executive Secretariat was intended to do so within the Scottish Executive. In Wales this would fall to the relevant committee within the Assembly.

the UK Parliament, at the same time straightforward political realism dictated that they had to be effective in mediating conflict between the parties where disputes arose.

Because of the asymmetrical nature of the devolution settlement, it became clear that two types of concordat would be needed—bilateral and quadrilateral.[25] Bilateral concordats would cover inter-administration relations between an individual Whitehall department and its counterpart in one devolved administration.[26] In the main, these documents codified the intra-administration consultation and co-ordination good practices which prevailed prior to devolution, and appended new provisions for resolving inter-administration disputes. Quadrilateral concordats, on the other hand, were (to be) signed jointly by UK Government and each of the (three) devolved administrations. Quadrilateral concordats set out the arrangements for co-operation between the territorial and UK Governments on matters of common interest that lay outside single departmental responsibility (e.g. statistics), and on reserved matters on which a territorial, as opposed to a departmental, input was appropriate, such as international relations and UK European Union policy.[27] Later, two additional considerations shaped the final structure of the concordats. First, as many of the terms and conditions of inter-administration policy co-operation and co-ordination (including the provisions for dispute resolution) would have general applicability to all concordats (bilateral and quadrilateral), it was decided to incorporate these within an over-arching "super concordat"—the Memorandum of Understanding (MoU). The conditions stipulated in the MoU would be implicit to all other concordats or supplementary agreements.[28] Second, the asymmetry of the devolution legislation meant that certain aspects of each of the quadrilateral concordats were not applicable to both Scotland and Wales. This was catered for by producing a common quadrilateral concordat flanked by two bilateral concordats where required.[29] The concordats were presented in two tranches. In October 1999 the MoU, incorporating five quadrilateral concordats, was released. This was followed by the publication, one by one, of the bilateral—departmental and administration specific—concordats.

The structure of the concordats is fairly straightforward. The MoU is divided into two parts. The first part defines the "principles that will underlie relations"

25 A range of options for the design of the concordats were considered as the inter-administrative implications of an asymmetric devolution settlement became clearer.

26 As the name implies, a bilateral concordat involved only two parties—the Whitehall department and its territorial counterpart in a devolved administration. Most concordats are bilateral simply because the respective devolution settlements differ so greatly.

27 If a policy was covered both by a bilateral and a quadrilateral concordat (e.g. agricultural) then the terms of the former had to be consistent with the terms of the latter.

28 That is, any inter-administration procedures agreed subsequently.

29 This was the case in the concordat on International Relations, and the concordat on the EU.

between UK Government and the devolved administrations.[30] As already indicated, it elaborates the broad principles that will govern inter-administration policy co-operation and co-ordination, emphasising in particular the need for timely and comprehensive exchange of information, full consultation over relevant matters, and confidentiality of deliberations. The first part also asserts the general principle that, despite their reserved status, the devolved administrations will be involved in UK international and EU policy-making insofar as these issues affect devolved competencies. Finally, this part provides for the establishment of a Joint Ministerial Committee (JMC) to be used to resolve inter-administration disputes.[31]

The second part of the MoU elaborates the arrangements through five quadrilateral concordats: (a) agreement on the Joint Ministerial Committee (JMC); (b) concordat on co-ordination of EU issues; (c) concordat on financial assistance to industry; (d) concordat on international relations; and (e) concordat on statistics. In each case, the concordat stipulates the obligations that fall on each of the administrations in jointly contributing to UK policy in these policy issues, and provides guidance for resolving any disputes that may arise.

The agreement on the JMC is fundamental to the devolution exercise. Its terms of reference are: (a) to consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities; (b) where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the UK; (c) to keep the arrangements for liaison between the UK Government and the devolved administrations under review; and (d) to consider disputes between the administrations. In addition to dispute resolution, the JMC will address a range of policy issues that arise from the policy externalities accompanying devolution, including inter-administration consultation on UK European policy. None the less, it is likely to be in the discharge of its dispute resolution function that the JMC will receive the closest scrutiny. In this role, the JMC will convene—typically in functional format—where an issue (falling within the ambit of point (a) above) cannot be resolved through bilateral exchanges at ministerial level, or through the good offices of the territorial Secretary of State. The JMC machinery can be invoked by UK Government or any of the devolved administrations.[32] Any agreement reached within the JMC procedures will be

30 MoU, part 1, para 1.

31 The JMC was established to settle disputes between the territorial administrations and the UK Government with respect to policy over reserved matters, and as a forum for co-ordinating policy between the territorial administrations and UK Government with respect to devolved matters. It is an advisory body which will include Ministers from the devolved administrations and UK Government. Generally it will convene in "functional" format, and be chaired by the relevant UK Minister. Its conclusions are not binding on any party.

32 MoU, point A1.8.

consultative only, although "the expectation is that participating administrations will support positions that the JMC had agreed".[33] Finally, the proceedings of JMC meetings will be confidential, although "there may be occasions on which the Committee will wish to issue a public statement on the outcome of its discussions".[34] The MoU is complemented by a series of bilateral concordats signed between the UK Government and individual devolved administrations. As already indicated, bilateral concordats typically are agreements between the devolved administrations and individual Whitehall departments,[35] although in some cases are presented as agreements between the relevant ministers.[36] These concordats stipulate the expectations that each administration has with respect to policy co-operation and co-ordination in that policy area, with the specific emphasis of each being determined largely by the type of policy externality that has to be accommodated. In total some fourteen bilateral concordats have been signed between UK Government and the Scottish Executive.[37]

As we have already noted, concordats are not legally binding contracts. Nor are they intended to create rights or obligations that are legally enforceable. They are instead voluntary agreements between administrations which codify common sense principles of good governance in the context of devolution, including an understandable "no surprises" responsibility on both devolved and UK administrations. As the late Scottish First Minister Donald Dewar quipped, concordats can best be regarded as "road maps for bureaucrats".[38] Presented in that way, concordats appear to be sensible arrangements for effecting the smooth transition from a singular to a pluralist (or multi-level) governance system. However, even within these terms, to be successful the concordats in achieving their aim have to address two problems. First, concordats have to be interpreted and given effect by those to whom they are addressed—namely, the officials in the respective administrations. Like all institutions, UK Government departments embody deep-seated cultures in the form of conventions, habits and norms which will need to be superseded if the new

33 Ibid, point A1.10.

34 Ibid, point A1.11.

35 The Departments were the Department for Culture, Media and Sport; the Ministry of Agriculture, Fisheries and Food; the Cabinet Office; the Department of the Environment, Transport and the Regions; the Department of Trade and Industry; the Home Office; the Lord Chancellor's Department; the Department of Social Security and the Treasury.

36 This was the case for the concordats covering Defence; Education and Employment; and Health and Social Care.

37 The ethos of bilateral concordats is neatly captured in the concordat between the Scottish Executive and the Lord Chancellor's Department. The concordat seeks to ensure that there are "no surprises" between administrations with regard to any plans either has which might impinge on the responsibilities of the other.

38 Donald Dewar made this remark during the Scottish Parliament's debate on the concordats held on 7 October 1999.

arrangements are to work effectively. Second, the concordats have to generate a confidence within the polity in general that the arrangements they prescribe are working effectively—that the new arrangement of UK governance does involve a meaningful dialogue between equal partners and is not instead reproducing centralised government under a different guise. Otherwise critics may question the extent to which inter-administration procedures themselves are shaping or determining policy outcomes rather than the devolved administrations doing so by exercising the competencies assigned to them.

C. THE CONCORDATS: A CRITIQUE

Although presented by the Scottish Executive as administrative documents, the concordats became the subject of a heated political debate as soon as they were published. Critics, principally from within the Scottish National Party, raised two issues. First, that the provisions of the concordats effectively curtailed the sovereignty of the devolved administration and its legislature. Second, that the terms of concordats should have been subject to a debate within, and—crucially—ratification by, the Scottish Parliament before being adopted.[39] Both criticisms were rebutted vigorously by the Executive. The first criticism was dismissed, properly, as incorrect. As we noted earlier, the devolution legislation did nothing to weaken the sovereignty of the UK Parliament. Instead, it delegated to the Scottish Parliament the authority to legislate in devolved matters.[40] Consequently, as the First Minister pointed out, the provisions of the concordats did not—nor could they—affect the constitutional situation. The second criticism was dismissed on the basis that the concordats were agreements between the UK and the devolved administrations over procedures for policy co-operation and co-ordination. As the Parliament was neither a signatory to the concordats, nor was its constitutional position affected by the terms of the concordats, there was no reason for these documents to be subject to Parliamentary ratification. On the face of it, both answers are persuasive. However, neither has proved to be entirely convincing.[41] We suggest that the critics have raised important questions which have not, to date, been given adequate consideration—questions about how concordats should be conceptualised within the broader constitutional architecture of reformed British governance; the criteria by which certain provisions of the concordats should be evaluated; and the role of Parliament with respect to

39 These criticisms, and other more detailed points, were levelled by Alex Neil, MSP, on behalf of the Scottish National Party during the concordats debate.

40 The failure to distinguish between sovereignty and delegated authority is a cause of much confusion in the debate.

41 Concordats continue to be a subject of controversy, particularly in Scotland.

these tasks.[42] Nothing in our critique is intended to imply that the concordats are either unnecessary or undesirable. Quite the opposite is the case: given the nature of devolution, the type of arrangements provided for in the concordats are, as we have suggested, both necessary and desirable. Instead, we will argue that the essentially positivist interpretation of concordats offered by the Scottish Executive, and which is justified by reference to the *formal* constitutional position, ignores the practical significance that the concordats will assume in the new arrangements of British governance. That concordats have no base in constitutional law does not mean they are without constitutional significance.[43] Indeed, we conclude that the terms and operation of the concordats will be a crucial influence over the stability of the reformed system of British governance. There are two aspects to our critique. The first critique takes its cue from considerations of legitimacy, the second from issues of accountability.

(1) Concordats and legitimacy

A standard reading of the British constitution identifies it as a fluid set of procedures and arrangements which reflect a combination of law and convention, institutional codes and norms, principles and expediency and which, collectively, define the prevailing system of governance.[44] In that literature, the constitutional significance of the civil service is a prominent theme.[45] The civil service is fundamental to British governance. It is civil servants who transform political manifestos into effective Government policies, and who ensure continuity of governance at times of discontinuity in government. They are impartial policy advisors to Government, and are required to broker agreement between the departments of Government where disagreements over policy matters arise.[46] The civil service acts as the collective memory of the state, and it is civil servants who are responsible for providing the context for a new Government as it confronts the range of policy portfolios for which it has assumed responsibility. Civil servants discharge these various functions via a panoply of internal rules, codes, conventions and norms that are designed to facilitate the administration of governance as stipulated by the Government of the day, within constitutional constraints and with minimal interference from extraneous sources. To borrow a metaphor, the civil service can be characterised as the software of the operating system that is British governance, without which the operating system will

42 This latter question is crucial if, as provided for in the concordats, the arrangements are to be revised in the light of experience.

43 For a discussion regarding the role of conventions in constitutional theory, see C R Munro, *Studies in Constitutional Law*, 2nd edn (1999) at 55–87.

44 This conceptualisation of the British constitution begins with Bagehot's *The English Constitution*.

45 See, for example, P Hennessy, *The Hidden Wiring: Unearthing the British Constitution* (1995) at 119–138.

46 For an excellent overview of the Civil Service, see P Hennessy, *Whitehall* (1989) ch 16.

not function.[47] We can usefully extend this metaphor to capture the significance of the administrative arrangements which have been introduced to facilitate the transition to multi-level governance in the UK. Devolution has changed the internal configuration of the operating system of British governance; it has changed the structure of governance from singular to pluralist. Accordingly, the software that drives the operating system must be upgraded to ensure that the reconfigured system can execute efficiently the extended range of tasks now required of it, and resolve unanticipated problems that may arise. The software upgrade must incorporate routines that disable any viruses spawned within the new environment, which have the potential to immobilise the system. Indeed, astute software analysts will build-in an override facility within the new procedures to enable an operator to reboot the entire system under its original configuration should the new routines fail. The metaphor is obvious, as is its appeal. The reconfigured operating system of governance is defined by the devolution legislation. The concordats represent the software upgrade, and these incorporate various virus guards protecting the system from attack by policy externalities. The override facility is provided by the ultimate sovereignty of the UK Parliament which can be applied in the event of a bug in the software of the new operating system. The metaphor neatly explicates the argument that concordats are related to functions rather than to outcomes, and as such are an issue for functionaries and not politicians. At the same time, however, it captures graphically the significance of concordats as a new and crucial element in the internal administrative procedures of (reformed) British governance. The constitutional significance of concordats is laid bare: they are essential to the new governance arrangements. Should they fail, a constitutional crisis is likely to follow.

That the concordats will play a key constitutional role is undeniable: indeed, this is precisely their function. The concordats define the *mechanics* of inter-administration policy arrangements, including dispute settlement, the sole purpose of which is to buttress the new system of UK governance. They do this in three respects: (a) by modulating the legislative autonomy of the Scottish Parliament, though *not* its legislative authority;[48] (b) by defining the terms under which the devolved administrations will participate in the formulation and negotiation of UK policy with respect to specific reserved matters; and (c) by prescribing the arrangements for resolving disputes between UK Government and the devolved adminis-

47 Hennessy attributes this metaphor to Lord Bancroft, former Head of the Civil Service (*The Hidden Wiring: Unearthing the British Constitution* at 23). Later in the same volume, at 127, Hennessy cites Lord Bancroft describing the role of the Civil Service as "to act as a permanent piece of ballast in the Constitution on the basis that you have what can be a very volatile legislature and an equally volatile ministerial executive. Sometimes, therefore, you need a degree of balance and permanence".

48 If practised for a period of time, constraints on autonomy could result in a loss of authority.

trations on the above issues, including the openness of these arrangements to public scrutiny and Parliamentary accountability. Viewed in this context, it is clear that the concordats are more than simply procedural postscripts to the constitutional settlement. The concordats stipulate the conditions under which the conditional delegation of competencies to the devolved administrations and their assemblies will be exercised. However, that devolution is conditional in this sense is not the basis of the controversy.

That a Parliament may find its effective (as opposed to constitutional) legislative autonomy being constrained by force of circumstances is neither uncommon nor necessarily controversial—this is precisely the consequence of many international treaties and accords.[49] However, imposing limitations on the autonomy of Parliament which have *not* been debated *and* endorsed by that Parliament is a different matter entirely, and is almost certain to provoke controversy, even where it was implicit that it would be necessary to impose such limitations. And understandably so, as these restrictions command neither constitutional authority (in which case they would have been subject to debate and ratification) nor political legitimacy. Although scholars acknowledge that legitimacy is a notoriously vague concept which does not readily lend itself to rigorous analysis, it appears that concerns precisely of this nature lie at the heart of the Labour Government's constitutional reform measures. For instance, the Lord Chancellor, Lord Irvine of Lairg, has commented:

> The world's democracies face many challenges in common. Public disillusionment with politics is one of the most critical. From country to country, our circumstances may differ, but we share a common challenge—the perception by people that government serves the governors, not the people. It is the duty of those in government to demonstrate that democratic politics are not just better than the alternatives—but that they merit respect in their own right . . . The United Kingdom has suffered from a long drift towards ever greater centralisation of political power. This has caused many to feel that they have little or no opportunity to influence the important decisions that affect their daily lives. The accountability of government to the people has been damaged by a culture of secrecy . . . Our solutions are based on the incremental development of a mature democracy, where government is brought closer to the people.[50]

The relevant question is not whether devolution brings government closer to the people. As a constitutional event clearly it does. But it is straightforward to show that devolution is not coterminous with legitimacy. While a law enacted by the Scottish Parliament may be deemed "more" legitimate by Scots than one enacted by the Westminster Parliament *because* it was enacted by a Scottish legislature, it might

49 The Westphalian principle of sovereignty, that external actors are excluded from exercising influence over domestic authority structures, is breached by numerous voluntary international agreements, the most sophisticated of which undoubtedly are the EU Treaties.

50 "Britain's Programme Of Constitutional Change."

equally be deemed to be "less" legitimate if it is believed to be the product of an inter-governmental cabal convening outside the parliamentary process.[51] This argument can be clarified by considering the difference between the legal or formal validity of an action, on the one hand, and the social or informal validity of the same action on the other. As Weiler has argued, conceptions of legitimacy or validity extend beyond syllogism: we do not judge the legitimacy of an action solely by reference to its consequences. It is equally valid to apply legitimacy–illegitimacy discourse to the rule according to which the decision to undertake the action was reached. That is to say, the legitimacy of an outcome (policy) can be assessed by reference to the legitimacy of decisional rule which generated it, even where that rule is consistent with constitutional procedure. Decisional rules are thus being appraised by appeal to a deeper *normative* rule which "may pertain to some normative political theory which sets out conditions for 'legitimate' *government* . . . It may also pertain to ethics and morality as providing a deeper order of legitimacy against which even formally valid acts of *governance* may be checked".[52] The upshot of this argument is that not all outcomes necessarily command legitimacy in the broad sense even though they may be produced by constitutionally valid rules if these rules themselves are deemed to be illegitimate by reference to some commonly held notion of justice or fairness or appropriateness. Lord Irvine's comments can be interpreted in precisely this manner.[53] We may apply justifiably this form of legitimacy test to concordats as joint policy-making procedures and arrangements which deliver tangible outcomes. If the outcomes are to be accepted as valid, then these procedures and arrangements have to command legitimacy. Do the rules set out in concordats command legitimacy in this broad sense? In the light of the marginal role played by either the Scottish Parliament or the Welsh Assembly in shaping or endorsing the concordats, it is difficult to argue that they have been subjected to a legitimacy test.[54] Given the key role that the concordats are set to play in stabilising the reformed system of UK governance, this may have been an important opportunity missed.[55]

51 Ultimately this will depend on whether the public dislikes unrepresentative government more or less than collaborative government.

52 J H H Weiler, "Legitimacy and democracy of union governance", in G Edwards and A Pijpers (eds), *The Politics of European Treaty Reform* (1997) at 250 (emphasis added).

53 In a speech to the Constitution Unit in December 1998, Lord Irvine described the situation confronting the incoming Labour Government as, "something approaching a national crisis of confidence in the political system".

54 Although the concordats were debated and endorsed in both devolved chambers, neither the Scottish Parliament or the Welsh Assembly had the authority to amend the terms of documents.

55 For an alternative, but consistent, treatment of legitimacy, see C Meyer, "Exploring the European Union's communication deficit" (1999) 37(4) *Journal of Common Market Studies* 617. Meyer defines legitimacy as "a property of governance consist[ing] of an empirical component (public trust and support) and a normative component (justifiableness according to norms, values, traditions)".

(2) Concordats and accountability

Our second critique invokes considerations of accountability. Here we focus specifically on the arrangements agreed between the devolved administrations and UK Government for mediating policy-related disagreements—i.e. the procedures of the Joint Ministerial Committee (JMC). Arguably, the actions of the JMC will have the greatest constitutional impact over time—both in terms of its specific recommendations, and with respect to the manner in which it functions. As indicated earlier, the principal role of the JMC is to broker an inter-administration consensus with respect to policies of joint interest to the devolved and UK Governments where other channels—including the offices of the territorial Secretaries of State—have failed.[56] The JMC will be "one of the principal mechanisms for consultation on UK positions on EU issues".[57] While the JMC is a consultative body, "the expectation is that participating administrations will support positions that the JMC has agreed".[58] Therefore, although the JMC occupies no constitutional standing its deliberations are likely to assume considerable political significance. It is already clear that interest does not focus solely on the consensus position that the JMC might reach, but extends to the arguments which the participants present as the deliberations proceed. However, the MoU stipulates that: "The proceedings of the JMC will be regarded as confidential by the participants, in order to permit free and candid discussion", although "there may be occasions on which the Committee will wish to issue a public statement on the outcome of its discussions".[59] This stipulation, agreed by both UK Government and the devolved administrations, raises fundamental questions of accountability.

The Oxford English Dictionary defines accountable as being "obliged to give a reckoning or explanation for one's actions: responsible". In orthodox approaches to government, *accountability* is regarded as one of three pillars of democratic government, the others being the *authority to govern*, which is contingent on the electoral process, and the *responsiveness of government*, which requires government to meet the needs of all sections of society and not just its own constituents. In turn, for a government to be accountable for its actions, it must articulate a statement of aims; its actions in meeting these aims must be transparent; and it must assume responsibility for outcomes. Should any one of these conditions be breached, then accountability can only be partial at best. Self-evidently the arrangements for the JMC breach the transparency of actions requirement, and leave the other two largely

56 We confine our comments to the JMC in dispute settlement. Thus we are ignoring the "ceremonial" meetings of the JMC, and meetings of the "standing" Committees that have been established—i.e. on social exclusion and on the information society.

57 MoU, A1.9.

58 Ibid, A1.10.

59 Ibid, A1.11.

at the discretion of the administrations. While the MoU states that a public statement may be issued following a JMC, the implication is that this will report the consensus reached rather than the deliberations involved. In effect, therefore, the JMC procedures agreed upon will not render the devolved Executive accountable to the devolved Parliament, or the public at large, for the actions it takes—actions that may impact directly on the scope for the Parliament to exercise its legislative authority. The reasons given for the confidential nature of JMC deliberations are convincing to a point. Clearly where the JMC convenes to agree a matter such as the UK negotiating position to be represented in prospective EU policy deliberations it would make no sense to publicise the outcome ahead of the negotiations. Similarly, certain policy discussions may involve questions appertaining to national defence and security which, by their nature, must remain confidential. However, obvious exceptions apart, the case for confidentiality—especially after the relevant negotiations are concluded or policy agreements reached—is less convincing. Transparency need not require the publication of a verbatim transcript of the deliberations. Authoritative reports of the discussions, or agreed minutes of the meetings, would go far in facilitating the accountability of the Executive. However, shrouding the activities of this key committee in secrecy can do little to advance the legitimacy of the evolving governance arrangements.

In the critique offered here, we conclude that there were valid grounds for arguing that the concordats should have been the subject of a comprehensive debate in the Scottish Parliament, and required the ratification of the Parliament before being adopted by the Scottish Executive. But is this an issue solely of historical interest? Or, are there reasons for expecting the matter of concordats to return to the political agenda? In the next section we consider why the controversy over the concordats may not yet be over.

D. CONCORDATS AND REGIONALISM: TAKING SUBSIDIARITY SERIOUSLY?

It is fitting to reflect on UK devolution in the context of the current EU-wide trend towards greater policy autonomy being given to regions even within its more centralist member states. Although the structure of regional governance in the EU falls significantly short of that which proponents of a "Europe of the regions" might advocate, devolution in the UK none the less is consistent with a general shift in the direction of an emerging EU system of multi-level governance comprising supra-national, national, and sub-national (or "third level") elements.[60] This raises

60 For a critical and informed review of the role of the "third level" in EU governance, see C Jeffery, "Sub-national mobilisation and European integration" 2000 38(1) *Journal of Common Market Studies* 1.

the question to what extent is devolution a practical example of the principle of subsidiarity—a principle that has, since the ratification of the Treaty on European Union (TEU), informed many contributions to the "Europe of the regions" literature? What, if any, lessons may the advocates of a greater measure of subsidiarity in EU governance draw from the process of devolution as it has been applied in the UK? In this section we argue that the UK's devolution experience in fact demonstrates the limitation of subsidiarity as a device for transcending the policy and legitimacy problems inherent to a process of trans-national governance generally, and EU governance in particular.

The role of the sub-national (or third) level of governance within the evolving structure of overall EU governance has, in recent years, become something of a preoccupation on the part of EU scholars. For many, a shift towards an multi-level governance system for the EU, in which regions play a larger role in the overall policy process, is considered to be both possible and desirable.[61] Enhancing the authority of the regions not only permits EU economic and social policies to be better adapted to dissimilar conditions within individual member states, it also represents a barrier to an over-concentration of power at the highest (EU) governance level. Instead, a shift to genuine multi-level governance in the EU will ensure that governance remains, or will be brought, close(r) to the citizens and societies it serves and thus will retain, or will acquire, popular legitimacy as a result.[62] However, much of this discussion of regionalism in EU governance is conducted in informal language. Multi-level governance is presented as a decision-making system in which regions within EU member states become involved as independent participants in the arrangements of EU policy-making and have competence for common policies which they are best placed to formulate and implement. The difficulty is—as the experience of UK devolution shows—that multi-level governance inevitably will be characterised by a plurality of sovereignties involving multiple agencies with shared and overlapping constitutional authorities. In the context of the EU debate, subsidiarity as a "rule of policy assignment" has been advanced as a device to ensure coherence in an EU multi-level governance system that includes sub-national authorities. The general subsidiarity "rule" stipulates that the competence for a policy should be assigned to that level of governance which can discharge it most efficiently, and that wherever possible this should be at that level

61 For a comprehensive review of this debate, see G Marks, L Hooghe and K Blank, "European integration from the 1980s" (1996) 34(3) *Journal of Common Market Studies* 341.

62 Among the objectives listed in a recent strategy document, the Commission includes new forms of European governance which include "new forms of partnership between different levels of governance in Europe", and strengthening "civil society's voice in the process of policy shaping and implementation to ensure a proper representation of Europe's social and economic diversity at European Union level". European Commission, *Shaping the New Europe; Strategic Objectives 2000–2005*, COM (154), February 2000, at 5–7.

which is "closest" to the citizen. Given that policy overlap and policy contagion are unavoidable features of multi-level governance, this will yield an EU governance arrangement in which each of the EU institutions, the member state and the sub-national governments *singly and severally* exercise policy competencies.

An important element in the growing preoccupation with multi-level governance has been the decline in the importance of the sovereign nation state within the EU decisional architecture. Indeed, some have questioned whether the nation state remains at all relevant to the current phase in the evolution of the EU. An example of this type of thinking is to be found in Neil MacCormick's collection of essays, *Questioning Sovereignty*.[63] There, he demonstrates how membership of the EU has changed fundamentally the nature of national sovereignty:[64]

> It is clear that absolute or unitary sovereignty is *entirely absent* from the legal and political setting of the European Community. Neither politically nor legally is any member state in possession of ultimate power over its own internal affairs. Politically, the Community affects vital interests, and exercises political power on some matters over member states. Legally, Community legislation binds member states and overrides internal state-law within the respective criteria of validity. So the *states are no longer fully sovereign states externally*, not can any of their internal organs be considered to enjoy present internal sovereignty under law; nor have they unimpaired political sovereignty.[65]

He concludes: "Western Europe's successful transcendence of the sovereign state and of state sovereignty is greatly to be welcomed."[66] Later he suggests that subsidiarity can be a basis for recognising "further levels of system differentiation",[67] where this points to arrangements of governance "beneath" the nation state as well as beyond it. In short, subsidiarity is seen as offering a mechanism for reconciling the demands of sub-national groups for a greater measure of legislative autonomy in a way that does not undermine the coherent and unitary economic and political framework of the EU. It provides a non-divisive method for promoting self-determination and cultural diversity. But is this a correct reading of subsidiarity?

It is certainly true that European integration has changed the nature of national sovereignty available to the EU member states. Similarly, subsidiarity provides a conceptual framework for assigning competencies between national and EU levels of authority. However, we take issue with two propositions implicit or explicit in the aspirations for EU multi-level governance as suggested by MacCormick. First, is

63 N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999) at 123–136.

64 This argument is worked through in ch 8 ("On sovereignty and post-sovereignty") and ch 9 ("Democracy and subsidiarity in the European Commonwealth") of the volume.

65 Ibid, 133 (emphasis added).

66 Ibid, 133.

67 Ibid, 135.

it true to say that European integration has *transcended* "the sovereign state [and] state sovereignty"? Second, is subsidiarity capable of providing an intellectual framework for determining policy assignment beneath the level of the nation-state as well as beyond that level? The conclusion we derive from our analysis of the devolved governance arrangements in the UK instead is that subsidiarity, as defined in the Treaty of European Union (TEU), has a meaning only within the unique setting of the EU as a union of sovereign states. And, insofar as the EU remains solely a union comprising of nation states, while subsidiarity may continue to inspire thinking about the structure of multi-level governance in the EU, it cannot be applied instrumentally to achieving that end.

Elsewhere we have argued, as have others, that the principle of subsidiarity within the EU debate, and as reflected in European Treaty reform, in fact comprises two elements.[68] On the one hand, it is presented as a tenet of democratic government which stipulates that decisions should be taken as closely to the citizens as possible.[69] As MacCormick notes:

> The doctrine of subsidiarity requires decision-making to be distributed to the most appropriate level. In that context, the best democracy—and the best interpretation of popular sovereignty—is one that insists on levels of democracy appropriate to levels of decision-making.[70]

On the other hand, subsidiarity is advanced as a (potentially justiciable) procedural rule for assigning powers between different levels of government according to specific efficiency criteria, within the constraints imposed by compliance with democratic principles.[71] When presented as a doctrine or canon of good governance, the appeal of subsidiarity is self-evident. Further, it is a doctrine that plausibly can be applied to conceptualise a range of alternative arrangements for the governance of a system in which public policies exist, and in which decisions about the nature of these policies have to be taken.

But persuasive as it may be as a doctrine, subsidiarity suffers from two principal defects as a constitutional tool. In the first place the complexities arising from policy externalities already described (i.e. overlap and contagion) have to be effectively managed if a binary rule of policy assignment is to be avoided and, instead,

68 See A Scott, J Peterson and D Millar, "Subsidiarity: A Europe of the Regions vs the British Constitution?" 32(1) *Journal of Common Market Studies* 47.

69 This depiction of subsidiarity appeared in art A, TEU (art 1, Treaty of Amsterdam).

70 N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, at 135.

71 Article 5 (ex 3b), Treaty of Amsterdam. Under this rule, the EU will act in areas of concurrent competence "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States". However, as has been argued, this is a very imprecise rule and alternative formulations exist which better lend themselves to objective operationalisation.

subsidiarity applied meaningfully.[72] This is because subsidiarity is a process for managing competing claims with respect to the application of concurrent powers. To achieve this, subsidiarity must have a capacity to direct a legislative inquiry in order to determine the consequences should one level of governance refrain from exercising its legitimate authority over a measure in deference to considerations raised by another level of governance with whom it shares competence over that measure.[73] If it is to command legitimacy, such an inquiry must be transparent and engage the legislatures involved (not the executives). It must evaluate both elements (legitimacy and efficiency) that comprise the principle of subsidiarity, and the process should be justiciable.[74] Second, the corollary to a consistent application of subsidiarity is the requirement that the multi-level governance structure is sufficiently fluid to permit policy competencies to be reassigned between the different levels as circumstances dictate. It is unlikely that a particular configuration of policy assignment will remain optimal indefinitely. As the barriers that separate the internal economy and society (i.e. the policy jurisdictions) of the EU progressively fall, the interdependencies between the regions will intensify. The logic of this, as the history of the EU has demonstrated, is for more and more authority automatically to gravitate to the "higher" level of governance.[75] This can be avoided only by correctly specifying the conditions necessary to facilitate that application of subsidiarity as a process —that is, as an on-going and ever-present legislative inquiry. If we are to define a constitutional architecture for EU governance, first we have to stipulate the objectives that we wish it to meet, and the criteria by which we might appraise or revise it. This is not a novel argument. Any account of the origins of the prevailing constitutional arrangements of EU governance would focus on the primary objective of designing a governance system that revolved around (and buttressed) the nation state but which, at the same time, eroded or contained particular elements of national sovereignty through a partial shift to supranational governance.[76] Further, a prominent role would be accorded to the judicial process within that arrangement. In a similar way, only a comprehensive analysis of the role that subsidiarity can play

72 A binary rule simply states that if one level of governance has competence over the policy, no other level of governance has authority over how that competence is exercised. While a binary rule is possible, it raises serious problems of policy spillover and policy contagion unless a strict separation of the policy jurisdictions can be enforced.

73 The suggestion of a legislative inquiry originates in G A Bermann, "Taking subsidiarity seriously: federalism in the European Community and the United States" (1994) 94 (2) *Columbia Law Review* 335.

74 Legitimacy requires accountability, which in turn necessitates transparency. Bermann describes this as the "confidence building" function of subsidiarity: ibid at 367.

75 In effect this describes the historical dynamic of "state-building"—see S H Beer, *To Make a Nation: The Rediscovery of Amerian Federalism* (1993) at 11.

76 See, for instance, A S Milward, *The European Rescue of the Nation-State* (1992).

in legitimating the EU governance system will enable us to design the constitutional arrangements necessary for its realisation.[77]

To be sure, the governance system of the EU has, partially and imperfectly, accommodated both defects noted above. The formulation of subsidiarity set out in art 5 (ex 3b) of the TEU was an attempt to manage the problem of concurrent powers by setting an effectiveness "test" that all proposed EU policy actions must meet before they could become EU legislative proposals, and authority could consequentially gravitate to the EU level. But that test has neither been conducted transparently, nor been subject to judicial review.[78] Subsidiarity as practiced in the EU therefore fails the test of a meaningful legislative inquiry and, consequently, is unlikely to enhance confidence within the polity. Similarly, the EU governance system has proven itself to be fluid within its constitutional limitations. Competencies have been transferred from national to the EU governance level, both by formal Treaty revisions, and informally by use of the provisions of art 308 (ex 235).[79] In most, if not all, cases this transfer of competence has been predicated on efficiency considerations. Frequently, the competencies newly assigned to the EU level touched on policies hitherto the responsibility of sub-national governments of member states, and it is those governments who have been the integration "losers".[80] Therefore, while the extension of EU competencies may be regarded as extending the scope of supranational governance in the aggregate policy process at the expense of national governance, at the same time it has served to empower national governments at the expense of sub-national governments. This tendency for integration simultaneously to extend the competencies of EU governance and to strengthen the national institutions of member state governments is a well-known feature of the integration process.

Despite its partial and imperfect application thus far, the principle of subsidiarity as a process mediating policy assignment between the EU and the member state remains conceptually and constitutionally plausible. But this is the extent of its plausibility. When we turn to national and sub-national systems of governance, however, subsidiarity is not plausible. As implicit in MacCormick's arguments, the

77 Multi-level governance differs from multi-level administration, a difference which is not adequately addressed in the "regionalist" literature. Governance involves participation in each of the four stages of policy-making (formulation, negotiation, implementation, enforcement); administration in only the latter two of these.

78 The justiciability of subsidiarity is a subject of considerable debate within EU legal discourse. See the discussion in G de Búrca, "Reappraising subsidiarity's significance after Amsterdam", Jean Monnet Working Papers No 7/99, Harvard Law School.

79 In revisions to the Treaty of Rome there has been only one instance where a binary rule was applied: this was competence over monetary policy post-EMU. For obvious reasons competence for EU monetary policy could not be a shared between EU and national organs.

80 This explains why the TEU provided for the creation of the Committee of the Regions and introduced art 203 (ex 146).

matter turns on competing interpretations of sovereignty and, in particular, on his claim that "the [member] states are no longer fully sovereign states externally". Krasner lists four usages of the term sovereignty:[81] *domestic sovereignty*, which is the organisation of authority within the nation state; *interdependence sovereignty*, which refers to a state's ability effectively to control external problems independently of other states; *international legal sovereignty*, defined as a residing with a state whose claim to territoriality is recognised by other states and which voluntarily may enter into, or leave, agreements with other states; and *Westphalian sovereignty*, describing the non-interference by external actors in domestic authority arrangements. The key point is that while EU membership has eroded significantly both interdependence sovereignty and (consequently) Westphalian sovereignty, and has thereby restricted the scope of domestic sovereignty (although formally only in the sphere of laws),[82] it is not clear that it has undermined the international legal sovereignty of the member states. The litmus test of international legal sovereignty is whether or not a member state has the competence to withdraw from the EU. If it can do so, international legal sovereignty must be intact; if it cannot, then it has surrendered that sovereignty.[83]

It is tempting to regard this question solely as a matter of EU or international law which is possibly hypothetical.[84] But the implications extend beyond this legal technicality and impact directly on the application of subsidiarity in the manner proposed by advocates of multi-level governance. This is because it is only when a level of governance has international legal sovereignty that it is equipped to participate directly in a trans-national legislative inquiry concerning the management of concurrent powers.[85] And because levels of member state governance other than the national level are not sovereign in that sense, and accordingly have no independent constitutional status in the EU Treaties, they are unable to participate as partners in a process of policy assignment involving such an inquiry. Sub-national governments have no competence under EU law independently to participate in, or to conclude, agreements at the EU level. They may only do so in the restrictive sense of being delegates of the member state, as under art 203 (ex 146). Were they to have such independent competence, the international legal sovereignty of member

81 S D Krasner, *Sovereignty; Organized Hypocrisy* (1999) at 9–25.

82 Krasner's definition of domestic sovereignty refers to "authority" to act and not "autonomy" to act. Only in the legal sphere does EU membership impinge on domestic "authority" structures.

83 The comparison is usually made with the US Constitution and the nationalist versus compact theorist debate which surrounded that Union in the run-up to the Civil War. The triumph of the nationalist rather than compact interpretation led to the conclusion that a state could not legally withdraw from the Union. In the EU any similar suggestion almost certainly would be considered preposterous.

84 As is well known, the problem stems from the silence of the EU Treaties on the issue of secession.

85 Although most federal systems have constitutional rules governing policy assignment between levels of government within the nation state, and means of changing this assignment, clearly these rules are not transferable to trans-national governance structures such as the EU.

states would, by definition, have ended. The conclusion is clear. Subsidiarity in the sense applied in EU discussions and in the TEU provides little effective purchase in effecting directly a transition to a genuine system of multi-level governance in the EU. It does, however, indicate the constitutional conditions required for such a transition to begin—namely that regions acquire a position of constitutional authority within the arrangements of EU governance allowing them to become a participant in a policy assignment process mediated by the principle of subsidiarity. Our review of subsidiarity indicates that the EU system of governance not only buttresses the role of the nation state rather than jeopardising it, but at the same time creates an incentive structure for sub-national government to campaign for independent statehood within the EU. This is the only route currently available for sub-national governments to participate in the subsidiarity process and, consequently, to react to demands for a greater measure of self-government and local autonomy as citizens increasingly question the legitimacy of a governance system in which regions have no constitutional "voice".

These questions of governance, legitimacy and subsidiarity are not confined to the EU but have broader relevance as reflected in research being conducted by international relations theorists and international legal scholars.[86] A pervasive feature of the organisation of the contemporary global economy is the emergence of international institutions which incorporate binding and enforceable rules and which are replacing the organisations of (commercial) diplomacy hitherto based on voluntary codes, behavioral norms, and policy discretion.[87] Although there is considerable dispute in the literature over the nature of the autonomy which these new institutions command—autonomy as delegated power versus autonomy as independent authority—few take issue as to the nature of the transformation underway. This poses a clear and distinctive set of challenges for national governance systems everywhere, challenges that are foreshadowed in the subsidiarity debate in the EU. Similar questions are bound to arise as the competence of global governance extends into new areas; that is, as policy spillover proceeds.[88] What powers will sub-national

86 For an excellent review of this literature see A-M Slaughter, A S Tulumello and S Wood, "International law and international relations: a new generation of interdisciplinary scholarship" (1998) 92(3) *American Journal of International Law* 367. However, the genesis of this work is much older. It is foreshadowed by J H H Weiler in his 1982 exhortation that political scientists take more account of the role of the European Court of Justice in analysing the political dynamics of European integration (J H H Weiler, "Community member states and European integration" (1982) 21 (1 & 2) *Journal of Common Market Studies* 39. For the seminal analysis of the interaction between the EU legal order and the integration process generally, see J H H Weiler, "The transformation of Europe" (1991) *Yale Law Journal* 100.

87 Slaughter et al note that "much [international] institutionalised co-operation has taken an increasingly 'legalized', ' judicialized' or constitutional form", ibid at 370.

88 For example, spillover is evident by the emergence of international debates over common rules with respect to a raft of trade-related national measures including competition policy, environmental issues and labour standards.

authorities be able to retain as global governance moves into new policy areas and nation states are required to acquire greater authority over domestic policies in order that they may successfully bargain within these international governance institutions? To turn the argument around, in a world where an ever-increasing part of our economic and social interactions is governed by international institutions according to rules, regulations and conventions, what scope remains for meaningful regionalism that does not undermine the international legal sovereignty of the state?

E. CONCLUSIONS

In this paper we have reviewed the role of the concordats in the new, post-devolution governance of the UK. The object of the paper has been to demonstrate the procedural centrality and constitutional significance of the concordats to the revised governance system, despite the fact that concordats have no constitutional status. None the less much will depend on the practical inter-administration policy-making arrangements and dispute resolution provisions that are set out in the concordats. It is these arrangements that have to manage the transition from a singular to a pluralist governance system for the UK, and make a success of the latter. To the extent that devolution was a response to the crisis of legitimacy of UK Government, we suggest that the failure to have these documents fully debated and subject to ratification by the new territorial assemblies was ill-judged. Because the concordats were adopted by the administrations without first referring these to public scrutiny and debate, it is plausible to claim not only that they have not been properly legitimised but that policy measures flowing from these arrangements—in devolved or reserved matters—also are lacking in legitimacy. Were such claims to be made, such is the centrality of the concordats to UK governance that a similar accusation could be levelled against the entire model of devolution.

We have also considered the concordats against the background of EU governance, and, in particular, calls that a greater measure of subsidiarity should be observed within those arrangements. From this study, it is difficult to contend that devolution represents a move to greater subsidiarity within either UK or EU governance, regardless of the temptation to describe devolution in the language of subsidiarity and multi-level governance systems. Instead, devolution demonstrates the fundamental weakness inherent to an application of subsidiarity as a general rule of policy assignment. We argue instead that subsidiarity, as commonly understood, cannot be used as a device to assign competencies between the different levels in a multi-level governance system which transcends the nation state, unless each of the levels have an accepted claim to international legal sovereignty. This condition applies to none of the sub-national authorities within any of the EU member states.

None of this changes the nature of the legitimacy crisis affecting either the UK or EU systems of governance. In the UK system, we have suggested reasons why devolution may not rescue governance from "something approaching a national crisis of confidence in the political system". The danger is that the lack of transparency and accountability which characterised the entire concordat process may undermine those who would wish to present concordats as necessary and legitimate arrangements for maintaining the coherence of governance in the post-devolution UK. It is tempting to regard this as an issue of purely historic interest. As the concordats were debated in, and effectively endorsed by, both the Scottish Parliament and the National Assembly for Wales, our concerns may be deemed to a historical curiosity. However, under the terms of the concordats it is open to any signatory to request a review of their provisions. This may or may not occur, and much is likely to depend on future political developments in Scotland and Wales. As we have seen, the concordats play a pivotal role in the new constitutional arrangements of the UK. And because of this, any move to reopen the debate over their content could readily evolve into a more fundamental constitutional debate the outcome of which is far from certain.